



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 394 OF 2012**

**LOCHAB LIMITED .....APPELLANT**

**VERSUS**

**TOBIAS OWINO .....RESPONDENT**

**RULING**

1. The respondent filed the chamber summons dated 22<sup>nd</sup> May 2015 seeking for the appeal lodged by the appellant to be dismissed for want of prosecution. He argued that the appeal was filed on 15/8/2012 and the appellant has not taken any step to set down the appeal for direction. The application was opposed by the appellant on the basis that the lower court file had not been availed even after making several requests.
2. The application was determined and this court on 3/11/2017 ordered the appellant to file a record of appeal within 15 days and thereafter list the appeal for directions within the 15 days after filing the record of appeal. Failure to comply with either of the orders the appeal shall stand dismissed
3. On 16/11/2017 however the appellant filed an application seeking that the period be extended to enable the appellant file its record of appeal and fix the matter for directions. The application was grounded on the ground that since the orders were issued, the appellant was unable to trace the lower court file and as result the appellant was unable to file the record of appeal.
4. The application is opposed by the respondent as a gross abuse of court process. The matter was heard and this court on 25/1/2018 granted the said application and extended its orders for a further 90 days.
5. On 26/11/2020 after the parties failed to reach at a settlement the respondent asked this court to once again consider their motion dated 22/5/2015 and dismiss this appeal for want of prosecution.
6. **Section 79B** of the **Civil Procedure Act** provides that:

**"Before an appeal from a sub-ordinate Court to the High Court is heard, a Judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree, part of a decree or order appealed against he may, notwithstanding Section 79c, reject the appeal summarily."**

7. Further **Order 42 Rule 35 (2)** and **(1)** provides:

**"(1) "Unless within three months after the giving of directions under rule 13, the appeal shall have been set down for hearing by the appellant, the respondent shall be at liberty to either set down the appeal for hearing or to apply by summons for its dismissal for want of prosecution.**

**(2) If within one year after service of the memorandum of appeal, the appeal shall not have been set down for hearing the registrar shall on notice to the parties list the appeal before a judge in chambers for dismissal.**

8. The rule provides for two situations where an application for

dismissal can be made. The respondent can only apply for dismissal if, after directions have been given and the appellant has not taken action to set down the appeal for hearing.

9. The second situation is where the Registrar with notice to the parties shall place the appeal before a Judge for dismissal if one year after service of the memorandum of appeal and the appeal has not been set down for hearing.

10. In the supporting affidavit, Christine Adhiambo Oraro averred that the appellants were unable to file the Record of Appeal within 15 days as ordered by this court because the lower court file could not be traced at the Chief Magistrate's Court registry.

11. The deponent annexed to the supporting affidavit a copy of a letter dated 13<sup>th</sup> November 2018 the appellant wrote to the Deputy Registrar, Civil Division. It is further deponed in the aforesaid affidavit that the appellants have been unable to compile a complete record of appeal without the certified copies of proceedings, judgment and decree being availed.

12. The respondent filed grounds of opposition to oppose the appellants' motion. The respondent did not controvert the appellants' averments stated in the supporting affidavit.

13. I have perused the court record and it is apparent that receipt of the lower court file was noted on 26<sup>th</sup> March 2019 long after the days fixed to file the record of appeal had lapsed. I am therefore convinced that the appellants have given plausible explanation for their failure to file and serve the record of appeal within the period fixed by this court.

14. The motion dated 16<sup>th</sup> November 2017 has merit, it is allowed. Consequently, the period fixed by this court on 3<sup>rd</sup> November 2017 for the appellant to file and serve the record of appeal is extended by a further 15 days from the date of this ruling. Costs of the aforesaid motion to abide the outcome of the appeal.

**Dated, Signed and Delivered online via Microsoft Teams at Nairobi this 11<sup>th</sup> day of June, 2021.**

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**J. K. SERGON**

**JUDGE**

**In the presence of:**

..... **for the Appellant**

..... **for the Respondent**